

Not to Be Published

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
WESTERN DIVISION**

ORVILLE J. BERG,
Plaintiff,

vs.

JO ANNE B. BARNHART,
Commissioner of Social Security,
Defendant.

No. C03-4064-MWB

**ORDER REGARDING
MAGISTRATE JUDGE'S REPORT
AND RECOMMENDATION AND
DEFENDANT'S OBJECTIONS TO
REPORT AND RECOMMENDATION**

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I. INTRODUCTION

The plaintiff Orville J. Berg (“Berg”) seeks judicial review of the final decision of the Commissioner of Social Security denying his application for Title II disability insurance benefits under Sections 216(i) and 223, respectively, of the Social Security Act. This matter was referred to United States Magistrate Judge Paul A. Zoss. Judge Zoss recommended judgment be entered in favor of Berg and against the Commissioner. Report and Recommendation, Doc. No. 12. The Commissioner filed objections to the Report and Recommendation. Berg filed a response. The court considers this matter fully submitted.

II. BACKGROUND

Berg filed his application on February 8, 2000. (R. 90-92). He alleges disability due to asthma and allergies. (R. at 102). Berg’s application was denied on April 27, 2000, (R. at 68, 70-73), and denied again on reconsideration on October 16, 2000. (R. at 44, 51-55). On November 30, 2000, Berg requested a hearing before an Administrative Law Judge (ALJ). (R. 56). A hearing was held on June 22, 2001. (R. at 361-411). On August 28, 2001, Berg’s claim was denied by the first ALJ to review his application. (R. at 263-76). Berg filed a request for review by the Appeals Council. On March 5, 2002, the Appeals Council granted Berg’s request for review, vacated the first ALJ’s decision, and remanded the case for a new hearing and consideration of further evidence.■¹ (R. 279-84). On May 23, 2002 a new hearing was held. (R. at 412-56). On October 17,

¹ The remand for a new hearing was granted because the ALJ found Berg could return to his past relevant work even though the vocational expert testified that Berg was unable to perform his past relevant work.

2002, Berg's claim was denied by the second ALJ. (R. at 16-34). Berg filed a request for review. On May 19, 2003, the Appeals Council denied Berg's request for review, making the second ALJ's decision the final decision of the Commissioner.

Berg filed a timely request for review in this court on July 14, 2003. Berg filed a brief supporting his claim on October 27, 2003. (Doc. No. 8). On December 18, 2003, the Commissioner filed her response brief. (Doc. No. 9). On May 4, 2004, Judge Zoss issued his Report and Recommendation. (Doc. No. 12). On May 14, 2004, the Commissioner filed her objections to the Report and Recommendation. (Doc. No. 14). On May 20, 2004, Berg filed a response to the Commissioner's objections. (Doc. No. 15). The court finds the matter is now fully submitted for consideration.

III. LEGAL ANALYSIS

A. Standards Of Review

The standard of review to be applied by the district court to a report and recommendation of a magistrate judge is established by statute:

A judge of the court shall make a *de novo* determination of those portions of the report or specified proposed findings or recommendations to which objection is made. A judge of the court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate [judge].

28 U.S.C. § 636(b)(1). The Eighth Circuit Court of Appeals has repeatedly held that it is reversible error for the district court to fail to conduct a *de novo* review of a magistrate judge's report where such review is required. *See e.g., Hosna v. Goose*, 80 F.3d 298, 306 (8th Cir. 1996) (citing 28 U.S.C. § 636(b)(1)); *Grinder v. Gammon*, 73 F.3d 793, 795 (8th Cir. 1996) (citing *Belk v. Purkett*, 15 F.3d 803, 815 (8th Cir. 1994)). The Commissioner has made specific, timely objections in this case. Therefore, *de novo*

review of “those portions of the report or specified proposed findings or recommendations to which objection is made” is required here. *See* 28 U.S.C. § 636(b)(1).

The standard of judicial review for cases involving the denial of social security benefits is based on 42 U.S.C. § 405(g), which provides that “[t]he findings of the Commissioner of Social Security as to any fact, if supported by substantial evidence, shall be conclusive.” This standard of review was explained by the Eighth Circuit Court of Appeals as follows:

Our standard of review is narrow. “We will affirm the ALJ’s findings if supported by substantial evidence on the record as a whole.” *Beckley v. Apfel*, 152 F.3d 1056, 1059 (8th Cir. 1998). “Substantial evidence is less than a preponderance, but is enough that a reasonable mind would find it adequate to support a decision.” *Id.* If, after reviewing the record, the Court finds that it is possible to draw two inconsistent positions from the evidence and one of those positions represents the Commissioner’s findings, the court must affirm the Commissioner’s decision.

See Young v. Apfel, 221 F.3d 1065, 1068 (8th Cir. 2000).

The Eighth Circuit Court of Appeals also has explained, “In reviewing administrative decisions, it is the duty of the Court to evaluate all of the evidence in the record, taking into account whatever in the record fairly detracts from the ALJ’s decision.” *Hutsell v. Massanari*, 259 F.3d 707, 714 (8th Cir. 2001) (quoting *Easter v. Bowen*, 867 F.2d 1128, 1131 (8th Cir. 1989)); *Howard v. Massanari*, 255 F.3d 577, 581 (8th Cir. 2001) (“In assessing the substantiality of the evidence, we must consider evidence that detracts from the Commissioner’s decision as well as evidence that supports it.”) (quoting *Black v. Apfel*, 143 F.3d 383, 385 (8th Cir. 1998), with internal quotations and citations omitted). Accordingly, in reviewing the record in this case, the court must determine whether substantial evidence on the record as a whole supports the ALJ’s decision that

Berg is not disabled.

B. The Commissioner's Objections

The Commissioner objects to Judge Zoss's conclusion that Berg's description of his limitations is uncontradicted by the record. The Commissioner objects to Judge Zoss's finding that it was improper for the ALJ to rely on the lack of medical evidence in determining Berg was not disabled. The Commissioner asserts that despite finding the ALJ's RFC was proper, Judge Zoss determined that Berg was unable to work and substituted his opinion for that of the vocational expert who has testified that Berg was able to work. The Commissioner argues that there is substantial evidence in the record as a whole to support the Commissioner's decision. In the alternative, the Commissioner argues that if the court finds that the ALJ's decision was not supported by substantial evidence, the proper remedy would be to remand the case for further development of the record and the issuance of a new decision. Berg contends that the Commissioner's arguments are in error.

C. Discussion

Berg was 56 years old at the time of his hearing before the ALJ.■² Berg graduated from Iowa State University with a degree in Animal Science. Originally, he was a farmer and had a hog confinement setup. (R. at 380). He married and began investing in development real estate and flying airplanes. (R. at 381). Later he worked various jobs. He obtained a teaching degree and taught Vocational Education, he worked part-time as a courier, he worked as a court-appointed receiver for a bankruptcy case, and he worked as a real estate broker. He stated during the hearing that his wife was very well-paid and

² The court notes that Berg was three weeks short of his 57th birthday at that time.

responded to a question by the ALJ that he did not need to get out and work. (R. at 366). The record indicates that he suffers from asthma and allergies. He claims that allergies trigger his asthma but that he controls his asthma so well that he has not needed extensive medical intervention. In fact, Berg reported that he has not needed any hospital admission or emergency room visit because of breathing complications since September 1999. (R. at 427).

Basically, Berg is claiming disability based on asthma and allergies; or, allergies to irritants that trigger Berg's asthma creating alleged respiratory problems requiring Berg to leave areas. Berg asserts that his asthma and allergies have, "kind of turned [him] into a hermit because [he] hide[s] at home a lot." (R. at 431). He further states that he limits his time away from his house to "three, with a maximum of four hours" because his condition is so severe. (R. at 441). Berg summarized his limitation for being unable to leave his house as, "I can go out and do things for a period of four hours." (R. at 425).

Claimants are considered disabled under the regulations if they have an:

[I]nability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months.

§ 42 U.S.C. 324(d)(A). Further, the regulations require a step-by-step consideration of any current work activity, the severity of the claimant's impairments, the claimant's residual functional capacity and age, education, and work experience. § 20 C.F.R. 404.150(a). The regulations also provide that if a claimant suffers an impairment which meets the duration requirement and is a listed impairment, the claimant will be determined disabled without considering age, education and work experience. § 20 C.F.R. 404.1520(d).

In denying benefits, the ALJ determined that Berg suffers from severe asthma (R. at 33), but that his impairment was not disabling. Judge Zoss found that the ALJ relied on the lack of medical record evidence regarding Berg's allergies in finding Berg was not credible and this was in error. Judge Zoss also found that the ALJ's failure to develop the record was harmless. The Commissioner's objections to these findings will now be addressed.

1. Credibility of Subjective Complaints

The Eighth Circuit Court of Appeals has cautioned that "[t]he ALJ is in the best position to determine the credibility of the testimony and is granted deference in that regard." *Johnson v. Apfel*, 240 F.3d 1145, 1147 (8th Cir. 2001)(citing *Polaski v. Heckler*, 739 F.2d 1320 (8th Cir. 1984)). Therefore, courts "'will not disturb the decision of an [ALJ] who seriously considers, but for good reasons explicitly discredits, a claimant's testimony of disabling pain.'" *Id.* at 1148 (quoting *Pena v. Chater*, 76 F.3d 906, 908 (8th Cir. 1996), in turn quoting *Browning v. Sullivan*, 958 F.2d 817, 821 (8th Cir. 1992)).

As the Eighth Circuit Court of Appeals has explained,

In analyzing a claimant's subjective complaints, such as pain, an ALJ must consider: (1) the claimant's daily activities; (2) the duration, frequency, and intensity of the condition; (3) dosage, effectiveness, and side effects of medication; (4) precipitating and aggravating factors; and (5) functional restrictions. *Black v. Apfel*, 143 F.3d 383, 386 (8th Cir. 1998) (factors from *Polaski v. Heckler*, 739 F.2d 1320, 1322 (8th Cir. 1984)). "Other relevant factors include the claimant's relevant work history and the ***absence of objective medical evidence to support the complaints.***" *Id.* As we have often stated, "there is no doubt that the claimant is experiencing pain; the real issue is how severe that pain is." *Woolf v. Shalala*, 3 F.3d 1210, 1213 (8th Cir. 1993) (quoting *Thomas v. Sullivan*, 928 F.2d 255, 259 (8th Cir. 1991)). We will not

disturb the decision of an ALJ who considers, but for good cause expressly discredits, a claimant's complaints of disabling pain, even in cases involving somatoform disorder. *Reed v. Sullivan*, 988 F.2d 812, 815 (8th Cir. 1993); *Metz v. Shalala*, 49 F.3d 374, 377 (8th Cir. 1995).

Gowell, 242 F.3d 793, 796 (8th Cir. 2001)(emphasis added); *see also Dunahoo v. Apfel*, 241 F.3d, 1033, 1038 (also identifying the “*Polaski* factors” for analyzing subjective pain complaints); *Hogan v. Apfel*, 239 F.3d 958, 961-62 (8th Cir. 2001) (also identifying the “*Polaski* factors”).

An ALJ meets his or her burden to demonstrate grounds for disregarding subjective complaints where the ALJ articulates the inconsistencies in the record as a whole. *Johnson*, 240 F.3d at 1149; *see also Dunahoo*, 241 F.3d at 1338 (8th Cir. 2001)(“The ALJ may discount complaints of pain if they are inconsistent with the evidence as a whole.”); *Hogan v. Apfel*, 239 F.3d at 962 (same). Moreover, “[i]f the ALJ discredits a claimant’s credibility and gives a good reason for doing so, we will defer to its judgment *even if every [Polaski] factor is not discussed in depth.*” *Dunahoo*, 241 F.3d at 1338 (emphasis added) (finding further that the ALJ’s decision was adequate where “[t]he ALJ recited the five *Polaski* factors and detailed the relevant evidence”); *Hogan*, 239 F.3d at 962.

a. Daily activities

Judge Zoss agreed that the ALJ cited to significant daily activities that were inconsistent with Berg’s claim that he is unable to complete a workday without significant interruptions caused by exposure to irritants. Berg testified that his impairment had, “kind of turned [him] into a hermit because [he] hide[s] at home a lot.” (R. at 431). He further states that he limits his time away from his house to “three, with a maximum of four hours” because his condition is so severe. (R. at 441). Berg summarized his limitation to leave his house as, “I can go out and do things for a period of four hours.” Yet, the

record indicates on February 1, 1999, he requested medication to take with him on vacation. (R. at 236). On June 30, 1999, he requested a prescription for Prednisone³ because he was traveling to Indiana to visit his mother-in-law who had lots of dogs and cats and he was worried about his multiple allergies. (R. at 233). Yet, at the hearing before the ALJ when the ALJ asked if Berg kept household pets Berg replied, “No, that would definitely be a no-no. I don’t go places where they have household pets.” (R. 430). On February 7, 2000, he called his doctor because he was leaving on vacation and wanted medications with him in case he had trouble. (R. at 227). On March 4, 2002, Berg reported to his doctor that he had spent some time in California this past winter and didn’t have to use his inhalers several days during the time that he was there.” (R. at 313). Berg testified before the ALJ that he had driven from Iowa to Southern California where he vacationed for ten days or two weeks before returning to Iowa. (R. at 406, 432).

Berg also testified that he attends Rotary meetings once a week but sometimes he will leave because he cannot tolerate a perfume. (R. at 434). He testified that he is on the City Council and that he is a Soil Commissioner. (R. at 435). He testified he attends meetings with other members and that meetings are sometimes “right on the lakeshore of the south end of Lake Okoboji.” (R. at 435). He testified to attending monthly meetings. (R. at 436). Berg also testified to doing a lot of computer work, including writing correspondences, e-mailing, preparing for meetings, and conducting telephone conference calls with the staff at the Soil District. (R. at 436). The court notes that Berg’s computer work at home would expose him to changing toner, paper dust and other printing irritants but that Berg did not complain about such irritants. Berg testified that his volunteer

³ Prednisone is a form of steroids given for bronchial asthma when conventional treatment is inadequate. Medical Economic Data Production Co., 1995 Physicians’ Desk Reference 2537 (1995).

activities take up about two hours a day. (R. at 436). He also testified that he enjoys jet skiing several times a week. (R. at 436). The court notes that there was no indication how long he is out of his house when he is jet skiing but it is probable that he is out of his house for at least one or two hours at that time. Berg testified he mows and rakes his lawn with a mask. (R. at 437). He also submitted to the court a summary of a typical day which includes eating one meal out at a restaurant, running errands and taking care of his mother. These types of activities are inconsistent with Berg's testimony that he has become a "hermit" because of his impairments. In addition, the testimony of witnesses only provided observations and comments of Berg's reported condition. The court agrees with the Commissioner that the ALJ has cited to significant daily activities that are inconsistent with Berg's claim that he would be unable to complete a workday without significant interruptions caused by exposure to irritants or that he has become a "hermit" because of his condition. It is true that it would be wrong for the ALJ to require proof that a claimant is bedridden in order to be awarded benefits. However, it is proper for the ALJ to consider a claimant's daily activities as part of the credibility analysis and, further, although daily activities alone do not disprove disability, they are a factor to consider in evaluating the subjective complaints of the claimant, especially when a claimant's testimony is inconsistent with a claimant's behavior. In this case, the ALJ noted the inconsistencies between Berg's daily activities and his subjective complaints. (R. at 23-30).

[T]he claimant's daily activities are inconsistent with the level, severity, and frequency of symptoms he describes. In spite of his alleged environmental restrictions he has continued to engage in a full range of daily activities, he leaves his home on a daily basis, he eats out on a daily basis, he jet skis several times a week, he has visited relatives in Indiana and gone on vacation, and he is very active in community affairs. The

claimant has, by his own description daily exposure to the environment of a public café, and frequent exposure to the environment of a nursing home and public buildings which would necessarily expose him to some of the irritants listed in Exhibit B-12 and he leaves his home area for visits and vacation. Such exposures have not caused the need for medical intervention or adjustment in treatment.

(R. at 28-29). The ALJ concluded that these activities were simply inconsistent with Berg's alleged claim that he is not able to work because he has to completely control his environment at all times. An ALJ meets his or her burden to demonstrate grounds for disregarding subjective complaints where the ALJ articulates the inconsistencies in the record as a whole. *Johnson*, 240 F.3d at 1149. Moreover, "[i]f the ALJ discredits a claimant's credibility and gives a good reason for doing so, we will defer to its judgment even if every [*Polaski*] factor is not discussed in depth." *Dunahoo*, 241 F.3d at 1338. Subjective complaints may be discounted if there are inconsistencies in the record as a whole. *See Polaski v. Heckler*, 739 F.2d 1320, 1322 (8th Cir.1984). The court concludes that the ALJ's finding that Berg was not credible is supported by substantial evidence in the record as a whole. Therefore, as to this issue, the Commissioner's objection is sustained.

b. Duration, frequency, and intensity of condition

The ALJ also addressed the duration, frequency and intensity of Berg's impairment. When considering asthma or respiratory impairments, the courts consider whether there is an extensive history of attacks. It is not enough that Berg self reports he has asthma and allergies so severe that he is not able to work, there must be objective evidence of his condition and evidence that his functional limitations prevent him from working. Berg argues that working would be impossible because he would have to leave frequently because of irritants in the work place that he cannot control. In support of the frequency

and intensity of his condition, Berg had witnesses testify at his hearing.

The court finds that the record contains no objective medical records to establish that Berg has asthma and allergies at the level of intensity and severity he claims. The only evidence that exposure to the variety of irritants listed by Berg prevents him working is what he has reported to others. In fact, Berg stated he has not sought hospital or emergency room intervention since 1999. Although Berg had witnesses testify as to the severity of his asthma and allergy condition, the court notes, none of the witnesses testified that they saw an actual attack or severe physical reaction. Nor, did any witness testify seeing Berg medicate in response to an attack. Rather, the witnesses testified that Berg would report he was having a problem with a smell or Berg would report he had to leave or Berg would report he believed he had to take an action (such as tearing out the carpet in his house) because he reported he was having problems breathing. For example, when asked about Berg's trouble breathing David Nee testified:

The church just in the past several months has done a lot of work to improve the air circulation system inside the building. Not just for Orville, but for other people in the congregation. Orville certainly is one of them. When he leaves the services, he'll sit out in the foyer area just outside the main sanctuary. But when we've had problems with the air circulation when the system was being installed, Orville - - there were times when he wasn't able to come to church at all because of the environment that was there.

(R. at 384-385). Another witness, Carol Oskvig testified:

One in particular I can remember vividly with the cleaning people. We had a - - the commissioners had a board meeting one night, I'd say about a year ago. And the cleaning people were supposed to have done their cleaning some other time than during the board meeting. And Orville had to leave because of all the dust.

. . .

Another one, newspaper. We were passing a newspaper around the table at one of the commissioner meetings, and Orville had - - we had to put that newspaper down right away because of the dust and whatever's associated with the newspaper. You know, he wears a mask in large times of the - - a lot of the times of the year, particularly in the winter when we leave the building at noon hour to go eat at a restaurant as an office staff and commissioners.

. . .

I just see kind of the fringes of how this has affected him. Perfumes and colognes, and dust, and newspaper, and all that. That's everywhere. And so it would be very difficult to live with, let alone work in an everyday worktype situation environment.

(R. at 386-388). Another witness for Berg, Tamara L. Peterson, testified:

I've witnessed him come in our building, take a breath, and walk right out the door because of the effects of our environment on him. We have - - you know, basically, we have telephones and computers. We don't use any chemicals. But I see him come into our environment, and just because someone work or maybe it was the laundry detergent someone used on their clothes, or the goop they put in their hair that day, he could not stay in our environment and work.

. . .

I've seen him go to family functions, social functions, and walk in the door and walk right out, because some woman wore perfume or some gentleman had cologne that he couldn't tolerate.

. . .

And I've watched what Orville's disability had done to their [Berg's and his wife Kay's] life. I was there when Kay came to work and said, well, I came home last night and Orville took all the carpet out of the house because he couldn't breathe.

(R. 390-391). The witnesses testified that Berg reports he cannot tolerate certain smells but the objective and subjective evidence does not support the severity and self-imposed restrictions that Berg has placed on himself. Another witness, Jan Turner testified:

And my main contact with Orville is at the church setting.
And I used to think he was very aloof because he'd always stay
kind of a ways away from us. And I've seen him many times
have to even leave the church itself because of the air.

(R. at 394). Again, observing a person leave a place is not the same as witnessing medical treatment, medication administration or actual breathing difficulty. Mary Christianson testified:

I know he has many allergies, I believe asthma.

...

We're in Rotary together. We've been in Rotary together
many years. And when Village East was going through - -
That's where we hold our Rotary meetings each Wednesday.
And when they were going through a lot of redecorating and
remodeling, Orville wasn't able to attend our meeting or stay
at the meetings because of all the dust.

(R. at 397-398). These witness all testify that they have seen Berg report that he could not come to a place or that he had to leave a place because he could not tolerate a certain smell or dust. Berg testified that he ripped carpet out of his house because it caused breathing difficulties. Again, Berg's statements as to the severity of his condition are inconsistent with his daily activities. The witnesses' statements do not support a finding that Berg cannot work because he "frequently" would have to leave or that his condition is not controlled by medication. The statements, as noted by the ALJ, "are based on the claimant's presentation of symptoms which the undersigned finds are not medically or otherwise supported." (R. at 29). In fact Berg reported to the physician selected by the disability determination services that he has:

occasional “lung spasms”, normally well controlled with asthma medication. Symptoms are worse with cold air or fumes, and vary from day to day. His exacerbations normally subside w/i 20 minutes. He is able to prepare meals, do all the house cleaning and his laundry, drive and run errands, do some yard work, and perform his own personal care.

(R. at 170).

What the medical evidence shows is that Berg’s impairments have not caused him to seek extensive medical intervention and that his symptoms are controlled with medication routinely prescribed for asthma and allergies. However, a combination of asthma and allergies requires the court to look beyond normal objective pulmonary studies and response treatment. One measure of the severity of a claimed respiratory impairment that is episodic in nature is the frequency of severe episodes despite prescribed treatment. 20 C.F.R. Part 404, Subpart P. Appendix 1, 3.03B. The fact that Berg has not had episodes of severe attacks, in spite of prescribed treatment, occurring at least once every two months and the fact that there is no medical documentation or other evidence of prolonged expiration with wheezing between attacks is inconsistent with the claimed intensity of Berg’s condition. The fact that Berg states his condition is so controlled he does not have attacks, the fact that medications relieve his asthma and allergy symptoms, the fact that he has normal pulmonary studies, the fact that he claims to be vulnerable to acute attacks when exposed to allergens but such alleged attacks occur infrequently and do not require any hospital or emergency room intervention, the fact that despite self reports that he has become like a “hermit” and cannot leave his home for more than four hours a day, and yet manages to travel cross country, and the fact that his daily activities reveal a very active life; all of these facts serve as the basis for concluding that there are inconsistencies between Berg’s reported severity and the evidence contained on the record

as a whole. The ALJ stated:

The medical evidence as a whole shows that the claimant's reactive airways disease has not caused him to seek frequent medical intervention and that his symptoms are controlled with medications routinely prescribed for such impairment. Overall, the medical evidence does not support the claimant's description as to the frequency and severity of flares in his asthma in that his medical attention has been rather unremarkable.

(R. at 28). The court agrees with the ALJ. Therefore, as to this issue, the Commissioner's objection is sustained.

c. Dosage, effectiveness, and side effects of medication

The court has reviewed the medications and dosages of Berg's medical regime and finds that it is rather standard treatment for asthma and allergies. Berg testified that he is on Prednisone which is the "last resort" for individuals with asthma. Prednisone is one of many medications prescribed for asthma and Berg has not been instructed to take it daily. Berg's prescription is on an as needed basis. There are some claimants with asthma so severe that they must use Prednisone daily. Berg reported using it only twice in one year. The ALJ's addressed this issue:

Records from the Veterans Administration Medical Center show that when seen in July 2000 the claimant reported the use of Prednisone approximately 2 times a year, thus suggesting only 2 significant flares on a yearly basis [neither flare required hospital or emergency room treatment]. This is also consistent with records from the Veteran Administration that show the exacerbation proximate to September 2001 and a flare near Easter in 2002 [neither flare required hospital or emergency room treatment]. While he has described side effects with the use of Albuterol more than once a day, however, the medical record does not reflect that such has ever been reported to a medical professional or has such been

observed in a clinical setting.

(R. at 28). Berg reported using Abuterol ⁴ on an average of once a day. Berg stated that if he takes the Abuterol at about a quarter to eleven that he is able to go out and do things for about a period of four hours. (R. at 425). He reported that if he continues to take the Albuterol that it makes him shake so bad he cannot write and that he has problems sleeping. (R. at 425). However, as noted by the ALJ, the reactions Berg described, if he takes the Abuterol more than once day, have never been reported to a medical professional.

Early in the first hearing, Berg asserted that his impairment did not respond well to medications. (R. at 382). Yet, later during the hearing, Berg contends that the reason he does not have attacks is because he has his condition so well controlled.

ALJ: What I'm saying is, you go through here - - see, you don't see these severe asthmatic attacks where he has to go into the doctor's office for treatment on a very - -

REPR: That's a very good point.

CLMT: Can I answer?

REPR: Well, you can address that perfectly.

CLMT: The thing of it is, what affects me every day all day is the asthma. Yet, I go to the doctor for these other things, but the asthma and its control is very much part of every doctor's visit, whether it's put on there. Dr. Carlson and Dr. Gardner are very good to work with as far as controlling the

⁴ Ventolin (Albuterol Sulfate) is available in liquid and aerosol form and is administered for relief of bronchospasm to individuals with reversible obstructive airway disease (i.e. asthma). Medical Economic Data Production Co., 1995 Physicians' Desk Reference 486 (1995).

asthma. They allow me to have the steroids, the antibiotics, the drugs that I need to deal with the asthma when I have asthma problems. I have them on hand at all times. So I can deal with those things with a phone call. I call Carlson, and I say - tell the nurse to have him call me. . . . The steroids and the Albuterol are the two fall-back medicines that I use to control the asthma, but they both have severe side effects.

(R. at 408-409). Again, Berg testified that he experienced side effects to the Albuterol, yet the medical records do not contain any documented proof of Berg reporting any side effects of the Albuterol to a doctor, family member or friend. Additionally, Berg's daily activities do not reflect that he experiences any side effect that impact his functioning. Therefore, as to this issue, the Commissioner's objections are sustained.

Berg's subjective complaints are inconsistent not only with his medical treatment records but also with his own testimony. The court finds that the ALJ did not err in finding Berg's subjective complaints were not credible because the ALJ specifically addressed Berg's subjective complaints. The ALJ's findings were supported by substantial evidence contained in the record as a whole. Although Judge Zoss found that Berg's descriptions of his limitations were "uncontradicted by the evidence of record." This court does not agree. As discussed above, the medical records support a finding of asthma and allergies but not to the level and severity Berg self reports.

2. *Residual Functional Capacity*

The Commissioner objects to Judge Zoss's finding that Berg's RFC would prevent him from working. A claimant's RFC is determined by the limitations doctors place on a claimant's activities and the claimant's reported limitations if such limitations are supported by the evidence in the record as a whole. During the hearing, the ALJ asked Berg if there were any restrictions placed on Berg's activities because of his asthma. Berg stated, "Other than, you know, don't do things that bother it." (R. at 429). On February

23, 2000, Dr. Carlson provided the following opinion:

Mr. Berg can not do an excessive amount of lifting and carrying as this may exacerbate his asthma. Standing, walking, and sitting would not be limited. Stooping, climbing, kneeling and crawling are not recommended in excessive amounts. He can see, hear and speak normally. He should avoid work environments which contain dust and fumes as these would exacerbate his asthma and his allergies.

(R. at 225). Dr. Carlson opined Berg had asthma. Dr. Carlson provided no further classification for the type or severity of Berg's asthma. Although Berg testified that Carlson was not his treating physician but that he went to the Veteran's Administration for care, Carlson treated Berg from 1990 to 2000. (R. at 104).

The pulmonologist of record is Dr. ElShami, with the University Physicians in Sioux Falls. (R. at 428). The severity of asthma is classified based on frequency and duration of symptoms. The pulmonology community diagnosis of asthma is classified as one of the following: (1) mild intermittent asthma, (2) mild persistent asthma, (3) moderate persistent asthma, and (4) severe persistent asthma. On October 26, 2000, the pulmonary test results report included the doctor's impression that Berg had "borderline abnormal obstruction" and the diagnosis was "asthma." (R. at 338). During this examination Berg had no wheezing.

The objective medical evidence supports a finding that Berg suffers from reactive airways disease (asthma). The regulations provide that a respiratory impairment is deemed disabling if the pulmonary function test shows there is evidence of FEV1⁵ equal to or greater than shown in section 3.02A. 20 C.F.R. Part 404, Subpart P. Appendix 1, 3.03. The ALJ correctly addressed this issue finding that Berg's respiratory impairment, as

⁵ Forced vital capacity.

shown on pulmonary function tests performed prior to his alleged onset date, since the onset date, and just prior to his hearing, does not approach the level of severity required by the regulations. (R. at 21-22). Berg is claiming disability because of a respiratory impairment caused by his asthma and allergies which he claims is triggered by a wide variety of irritants. However, the pulmonologists' reports do not indicate Berg has severe asthma.

Given the treatment history of Dr. Carlson and Dr. ElShami, either doctor could easily have indicated that Berg was unable to work because of the vast list of irritants and that when exposed to irritants Berg's condition would be exacerbated, thereby making it impossible for Berg to function in the work place. However, neither doctor diagnosed Berg as having a severe respiratory disease. The ALJ included a restriction that addressed the work environment. The ALJ stated, "from an environmental standpoint [Berg] should avoid even moderate exposure to extremes of cold fumes, odors, dusts, gases, and poor ventilation." (R. at 31). Although, Judge Zoss found that the ALJ had included appropriate restrictions regarding Berg's RFC as presented in the hypothetical question given to the vocational expert, Report and Recommendation, Doc. No. 12 at 26, he found Berg's subjective complaints were credible and concluded an environmental restriction such as this would be difficult to imagine, "[u]nless Berg worked in a sterile environment, it is difficult to imagine how this limitation could be accommodated by an employer." Report and Recommendation, Doc. No. 12 at 31. Judge Zoss found that Berg's disability arose from the "fact that although he has the physical and mental abilities and work experience to perform a wide variety of jobs, he would be unable to control the introduction of irritants into the work environment to an extent that would allow him to work ongoingly in a full-time job." Report and Recommendation, Doc. No. 12 at 32. Judge Zoss's conclusion is based on his finding that Berg's subjective complaints were

credible.

The court agrees that the ALJ's hypothetical question set forth with reasonable precision Berg's impairment. Additionally, it is true that if Berg's subjective complaints were found to be credible, that the vocational expert testified that Berg would be unable to work. However, when the vocational expert was asked not to give full weight and credibility to Berg's testimony the vocational expert's opinion was that Berg could work. The vocational expert was instructed to include the DOT listings with environments containing the selective characteristics given by the ALJ, the vocational expert testified Berg had transferable skills to work as a telephone sales representative, credit card clerk, and appointment clerk. (R. at 450). The vocational expert also testified that these listings were fairly clean and controlled environments. (R. at 450). The vocational expert testified that a hypothetical person with Berg's age, education, work history, and residual functional capacity would be able to perform work in the national economy. (R. at 450).

A vocational expert's response to hypothetical questions provides substantial evidence if the hypothetical questions include, with reasonable precision, the claimant's impairments. *Starr v. Sullivan*, 981 F.2d 1006, 1008 (8th Cir. 1992). Although, Judge Zoss found the hypothetical question included appropriate restrictions in the RFC he disagreed with the vocational expert that Berg could perform work in the national economy. Judge Zoss accepted Berg's subjective complaints as credible and found that because there was no way to control the introduction of irritants into the work environment Berg would be unable to work. This court agrees with the ALJ and finds that Berg's allegations regarding his limitations are not totally credible. Berg's description of the severity and frequency of his condition's symptoms is not substantiated medically, by his daily activities or by the testimony of witnesses. His own testimony contains contradictions and inconsistencies. Therefore, as to this issue, the Commissioner's

objection is sustained.

3. *Duty to Develop the Record*

Judge Zoss found that the ALJ's decision in determining Berg was not disabled, relied on the ALJ's finding that there was a lack of medical evidence in the record. Judge Zoss found that the ALJ should have further developed the record by requesting alleged test results conducted in the 1970s at the Mayo Clinic and by failing to request new tests be performed regarding Berg's alleged allergies. However, Zoss determined that this failure was harmless. The Commissioner objects to Judge Zoss's interpretation of the ALJ's statement that the record lacked medical evidence.

The regulations are clear that an impairment must be based on objective medical evidence and the severity of the impairment can be determined by subjective complaints, as long as those complaints are not inconsistent with the record. A claimant seeking disability benefits under the Social Security Act has the burden of proving that he or she is under a disability as defined by the Act. However, the ALJ has a duty to fully develop the record and this duty arises from the Commissioner's regulatory obligation to develop a complete medical record before making a disability determination. § 20 C.F.R. 404.1512(d)-(f):

Before we make a determination that you are not disabled, we will develop your complete medical history for at least the 12 months preceding the month in which you file your application. . . . We will make every reasonable effort to help you get medical reports from your own medical sources when you give us permission to request the reports.

§ 20 C.F.R. 404.1512(d). Berg claimed an onset date of September 30, 1999 and filed his application on February 8, 2000. (R. at 90-92). The medical records provided indicate that Berg asserted he was diagnosed with asthma in 1976. (R. at 220). The Eighth Circuit

has repeatedly held that it is the ALJ's duty to develop the record fully and fairly, especially, when the claimant is not represented by counsel. However, the record in this case contains substantial evidence that is inconsistent with Berg's testimony and though not *per se* inconsistent with his witnesses' testimony the court discounts the testimony of the witnesses because none ever testified to witnessing an actual attack. The ALJ noted in his decision that Berg had no extensive history of attacks. Judge Zoss argues that the ALJ found Berg's subjective complaints were not credible because there was insufficient medical evidence to corroborate them as being environmentally significant but that the failure to develop the record was harmless. Report and Recommendation, Doc. No. 12 at 24. It is not the lack of medical records that concerns this court. The court finds there are plenty of medical records in this case. What is not in the evidence or contained in the medical records is documentation by treating physicians, hospitals or emergency rooms that Berg's condition is not controlled by medication. Nor is there any notation regarding Berg reporting that the dosage and side effects of his current medication affects his ability to function or keeps him from sleeping. What is in the medical record is a diagnosis of asthma and allergies. The ALJ's observation of "insufficient medical evidence" as to "corroborating" Berg's reported severity is not in error. The court agrees that the medical evidence does not corroborate Berg's self reported severity because the medical evidence is devoid of documentation that Berg has had frequent acute attacks, that he suffers from side effects, and that the medication is not controlling his condition. Berg reports he lives like a hermit but the medical evidence shows medication being prescribed for trips in anticipation of a problem. Berg reports having to leave "environments" and that his medication does not control his condition, yet, the medical records contain no notations or comments that he has found it necessary to seek hospital or emergency room intervention because of frequent attacks. In fact, Berg testified that he had not had any

hospital or emergency room visit because of breathing complications since 1999. (R. at 427). The ALJ relied on pulmonary function tests to show that Berg's respiratory impairment is within normal limits. In addition, the Veteran's Administration that provides Berg's medical care has not found his condition so severe that further allergy testing was suggested. (R. at 429).

The court will not dismiss the severity of Berg's asthma and allergies based on his pulmonary studies and daily activities alone. While Berg's medication and structured control of his environment relieves his asthma, and while consequently he may have normal pulmonary studies, he nonetheless alleges he is vulnerable to acute attacks when exposed to a wide variety of allergen. Thus, a normal pulmonary study cannot serve as the basis for concluding Berg is not disabled and neither can the types of activities that Berg engages in if he is taking his medications and controlling his environment. However, the court cannot find that Berg's condition is as severe as he claims. Even if this court considers Berg's own control and treatment of his condition the regulations require more. If Berg truly was vulnerable to acute attacks when exposed to a wide variety of allergen, the medical records would have included such attacks and witness testimony would have described such attacks. The fact that Berg has had no need for hospital or emergency room intervention since 1999 for his condition, and there is no documentation of frequent acute attacks, is inconsistent with his reported severity.

The ALJ did not err in failing to require an allergy test. Berg's records indicate he has been diagnosed with asthma and allergies. However, it is the medical evidence including opinions, reports, and documentation; contradictions and inconsistencies in the record, that do not support an allergy impairment at the level and severity described by Berg. Although the record contains objective medical reports supporting a finding of asthma and allergies, the medical reports do not support a history of frequent acute attacks.

Again, no treating physician described Berg's asthma as severe. Throughout Berg's medical records the treating physicians indicate asthma with no further classification. Dr. Carlson opined Berg should avoid work environments which contain dust and fumes as these would exacerbate his asthma and his allergies. (R. at 225). At the Mayo Clinic, Dr. Mark Bubak opined, "Mr. Berg's asthma is mainly flared by exposure to irritants." (R. at 172). When seen at the Central Plains Clinic, Berg reported occasional exacerbations when exposed to candle fumes or dust; cold air, fumes, perfumes, hair spray, dry cleaning, and strong odors. (R. at 214, 220). Yet none of his exacerbations were severe enough to require medical intervention.

Under the Social Security regulations, an ALJ has discretion to order a consultative examination where he deems it is warranted. § 20 C.F.R. 404.1517. Several courts have held, however, that in fulfilling the duty to conduct a full and fair inquiry, an ALJ is required to order a consultative examination where the record establishes that such an examination is necessary to enable the ALJ to render a decision. *See Miller v. Sullivan*, 953 F.2d 417, 422 (8th Cir. 1992). Applying this standard, the court finds that the ALJs did not need to order a consultative examination. Berg pulmonary function studies results are within normal limits. Berg has been an active individual despite having asthma and allergies. Berg's impairment is not of such severity that he experiences monthly attacks requiring emergency room or hospital intervention. The court finds Berg's belief that he cannot tolerate certain environments, in spite of prescribed treatment, is inconsistent with his medical history which contains few documented occurrences of attacks and the attacks that are documented are infrequent and not prolonged. The regulations provide:

When a respiratory impairment is episodic in nature, as may occur in complications of bronchiectasis and asthmatic bronchitis, the frequency of severe episodes despite prescribed treatment is the criterion for determining the level of

impairment. Documentation for episodic asthma should include the hospital or emergency room records indicating the dates of treatment, clinical findings on presentation, what treatment was given and for what period of time, and the clinical response. Severe attacks of episodic asthma, as listed in section 3.03B, are defined as prolonged episodes lasting at least several hours, requiring intensive treatment such as intravenous drug administration or inhalation therapy in a hospital or emergency room.

20 C.F.R. Part 404, Subpart P. Appendix 1, 3.00C. The ALJ's decision recognized the fact that Berg reported not experiencing a severe attack requiring hospital or emergency room treatment since 1999. To meet or equal the listing for asthma the regulations also provide:

Episodes of severe attacks (see 3.00C), in spite of prescribed treatment, occurring at least once every 2 months, or on an average of at least 6 times a year and prolonged expiration with wheezing or rhonchi between attacks.

20 C.F.R. Part 404, Subpart P. Appendix 1, 3.03B. The medical records do not include documentation of Berg experiencing episodes twice a month or six times a year. It appears that his prescribed medication and treatment control his condition.

Berg has normal pulmonary studies, and though he reports being sensitive to a wide variety of allergen and constantly vulnerable to acute attacks, the record does not support the sensitivity or vulnerability he alleges. Berg's combination of impairments must meet or equal a listing. Based on the record, the court finds that Berg's condition or combination of conditions does not meet or equal the criteria in the Listing of Impairments. The ALJ did not err in failing to further develop the record. The ALJ stated there was a lack of medical evidence and the court agrees with the ALJ that the medical record lacked evidence that supports the severity of Berg's impairment as reported by Berg. The court

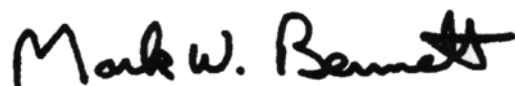
concludes that a remand is not necessary for a further hearing on Berg's allergies or the severity and frequency of his attacks because the medical records provided cover an extensive period of time and yet no doctor reported Berg's condition was severe or referred to frequent attacks. Therefore, as to this issue, the Commissioner's objection is sustained.

IV. CONCLUSION

Upon *de novo* determination of those portions of the Report and Recommendation, or specified proposed findings or recommendations to which the Commissioner has made objections, *see* 28 U.S.C. § 636(b)(1), the court finds that the Commissioner's objections must be **sustained**. Therefore, the Report and Recommendation by Magistrate Judge Paul A. Zoss concerning disposition of this matter is **rejected**. *see* 28 U.S.C. § 636(b)(1) ("A judge of the court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate [judge].") — and **judgment shall enter in favor of the Commissioner** and against Berg in this action.

IT IS SO ORDERED.

DATED this 2nd day of August, 2004.



MARK W. BENNETT
CHIEF JUDGE, U. S. DISTRICT COURT
NORTHERN DISTRICT OF IOWA